No. 44959-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BILLIE G. ROUSE, JR., *et al.*,

Plaintiffs-Appellants,

v.

CITIMORTGAGE, INC., *et al.*,

Defendants-Appellees.

On Appeal from the Superior Court in and for the County of Pierce
Judge Susan A. Serko
No. 13-2-06898-8

BRIEF OF PLAINTIFFS-APPELLANTS

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BILLIE AND SANDRA ROUSE'S CLAIMS RELATING TO AN INVALID NONJUDICIAL FORECLOSURE SALE ARE NOT BARRED BY THE DEED OF TRUST ACT'S STATUTE OF LIMITATIONS.

The Trial Court erred by concluding as a matter of law that Billie and Sandra Rouse ("the Rouses")'s claims were barred by the statute of limitations codified at RCW 61.24.127(2)(a). The Court should reverse the decision below because 1) the statute of limitations under Chapter 61.24 RCW does not apply to a claims arising from a foreclosure conducted in contravention of the requirements of the Deed of Trust Act ("DTA"), and because 2) the sale date for a trustee's sale of real property under the DTA cannot relate back to the day when the trustee accepts a bid if a valid Trustee's Deed is not recorded within fifteen days thereafter. RCW 61.24.050(1). Because the trial court clarified that, were it not for its erroneous conclusion that the Rouses' claims were barred by the statute of limitations, the Rouses' Complaint would survive Respondents' Motions to Dismiss, the Court should reverse the trial court, and remand this case to allow the Rouses to pursue their claims.

The trial court's own statements make clear that its ruling was based upon its interpretation of a specific issue of law. Although the Rouses maintained in their opposition, CP 67-91, to the motion to dismiss filed by Citi and MERS, CP 20-35, and in their argument to the trial court, that the statute of limitations set forth at RCW 61.24.127 does not apply to claims arising out of sales held in contravention of the Deed of Trust Act, at oral argument on the Respondents' Motions to Dismiss, the trial court stated,

> there's no need to respond to whether or not there is a sufficient claim asserted, at least insofar as CR 12… I took the complaint, I read it word for word, so please don't go back to all the facts on this case. *I'm focused on the statute of limitations … and whether or not it bars the claim at this point because of 127 in the foreclosure statute.*

COL 13; *see also* COL 20 ("So … this whole motion now boils down to 61.24.050 and how do you define foreclosure sale, and does the time period … relate back to February 18th or does it not."); *id.* ("I agree ... that foreclosure sale means the date of the auction, and based on that, the case was not brought within the two-year statute of limitations. And *on that basis alone I'm dismissing*. As I said before, were this just the issue of claims and whether or not there's been sufficient pleading, I would say there has been sufficient pleading."). (Emphasis added).

This Court should reverse and remand the trial court's erroneous ruling that the statute of limitations under the Deed of Trust Act bars claims stemming from a purported trustee's sale of residential real property where the sale was invalid under the Deed of Trust Act. Alternatively, the Court should reverse and remand because the trial court erred when it held that the date of a "sale," as that term is used at RCW 61.24.127, is the date when a purported trustee accepts a bid at auction, regardless of whether a corresponding, valid Trustee's Deed is recorded within fifteen (15) days thereafter as required by RCW 61.24.050.

A. STATEMENT OF THE CASE

This appeal arises out of the foreclosure auction of the Rouses' home, which the Rouses maintain was conducted without lawful authority.

The auction was called by the Respondent purported foreclosure trustee, Cal-Western Reconveyance Corporation of Washington ("Cal-Western"), on February 18, 2011.[1] On that date, Cal-Western accepted a bid for the Rouses' home from Respondent CitiMortgage ("Citi"). However, the Trustee's Deed required by statute to complete the sale was not recorded until March 9, 2011, some nineteen (19) days after the auction. As recorded, the Trustee's Deed reflects that it was executed on February 21, 2011, and that it was notarized on March 1, 2011. CP 1, Compl. ¶ 1.2. A brief summary follows presenting the factual basis for the Rouses' claims that the trustee's sale finalized March 9, 2011 was conducted without lawful authority in contravention of the Deed of Trust Act.

As their Complaint recites, CP 1-19, the Rouses once owned the property located at 17015 21st Avenue Court East, Spanaway, WA 98031 ("the Property"). The Rouses are raising their family there, including three children who receive SSI disability benefits. The Rouses' other income came from the operation of a towing business in which both husband and wife participated. However, a couple of years ago, the Rouses began to experience serious health problems that affected their ability to make their mortgage payments. The Rouses have had numerous hospital stays and Mr. Rouse has had serious liver disease problems. It is now clear that he will need a liver transplant. CP 3-4.

[1] Cal-Western has since filed a petition for relief under the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware on June 25, 2013. The Rouses do not intend to violate the automatic stay as to Cal-Western through their present appeal, and understand that they are precluded from seeking to recover monies from Cal-Western at this time. 11 U.S.C. § 362.

The Rouses' home loan was originated on or about December 13, 2001 by Central Pacific Mortgage ("Central Pacific") and was insured and guaranteed by the FHA. A Deed of Trust securing the loan obligation with the Property was recorded in the records of Pierce County, Washington on December 26, 2001. CP 99-103. The Deed of Trust indicated that the Lender was Central Pacific. The Beneficiary on the DOT was listed as Mortgage Electronic Registration Systems, Inc. ("MERS"), "solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns." The DOT also reads that it secures for the Lender the "repayment of the debt evidenced by the Note, with interest . . . (b) the payment of all other sums, with interest, advanced under Paragraph 7 to protect the security of the Security Instrument; and (c) the performance of Borrower's covenants and agreements under this Security Instrument." CP 4.

Paragraph 18 of the DOT states that the Lender has the right to initiate foreclosure by invoking "the power of sale and any other remedies permitted by applicable law." CP 102. The Lender is required "to give written notice to the Trustee of the occurrence of an event of default and of Lender's election to cause the Property to be sold." The DOT provides in various places that that the party with rights under the DOT is the "Lender." It does not say MERS, which is consistent with the requirements of the Note, which does not involve MERS at all, and it is consistent with the requirements of the Washington Deed of Trust Act. RCW 61.24, *et seq*. CP 4-5.

After the Rouses obtained their loan, they began to receive monthly statements from a company other than Central Pacific (the original lender). The Rouses paid their mortgage bills on time for several years, including the FHA mortgage insurance. A few years ago, Citi became the loan servicer. On May 11, 2010, the Rouses made a regular payment by phone to Citi in the amount of $1,032.14, and received a statement confirming receipt. On or about June 27, 2010, the Rouses were behind on the mortgage and Mr. Rouse made a payment in the amount of $2,024.28 in order to get partially caught up. This number was the amount listed on a statement from Citi as being Past Due. Later in July 2010, Mr. Rouse was rushed to the hospital and was there for three weeks, which is when he became aware of the severity of his liver disease. On July 27, 2010, Mrs. Rouse tried to make another payment and it was refused by Citi. She was advised that the Property was going to be foreclosed. She asked about the payments that had just been made in June and learned that the funds had been applied to reduce her principal balance rather than to catch up on the outstanding amounts. CP 5.

The statement that the Rouses received from Citi dated May 18, 2010 indicated that they were delinquent in the total amount of $4,065.10. CP 105-07. This amount included $205.50 in "delinquency expenses," $7.80 in "servicing fees," and $815.40 in late charges. The Rouses maintain that these amounts were not accurate or proper under the terms of the Promissory Note, especially the "servicing fees." Nothing in any of the mortgage documents permits the charging of a "servicing fee." In addition,

late charges could not have accrued to a total of $815.40, since the Rouses' monthly payment was only approximately $750.00. The Rouses maintain that other inappropriate and improper fees have been added to their loan balance over the years by Citi. CP 6.

The Rouses continued to communicate with Citi to try to resolve the situation while dealing with Mr. Rouse's health issues through the late summer and early fall of 2010. Unbeknownst to the Rouses, on or about August 2, 2006, Kathy Taggart, an employee of the Washington foreclosure trustee company Northwest Trustee Services, Inc. signed an Assignment of Deed of Trust, purportedly acting as Vice President of MERS, "solely as nominee for lender." CP 109. In the Assignment, Ms. Taggart purports to transfer the beneficial interest in the Rouses' Deed of Trust from MERS to Citi. The Rouses maintain that MERS did not have the power or authority to transfer any interest in their Deed of Trust to anyone. This document was recorded in the records of Pierce County, Washington on August 3, 2006. CP 6.

On or about September 2, 2010, one Naomi Feistel of Cal-Western signed a Notice of Default ("NOD") document which was then served upon the Rouses. CP 111-14. As of the date when the NOD was issued, Cal-Western had not been appointed as a foreclosing trustee. The NOD is deceptive and unfair in several ways: for example, it does not identify the owner of the Rouses' loan, as required by Washington law. RCW 61.24.030(8)(l). The NOD indicates that the Rouses were delinquent in the amount of $6,125.58 for six (6) monthly payments at $1,020.93 each,

which is inaccurate because the Rouses' monthly payment amount prior to July 2010 was only $1,012.14. The NOD also includes other inflated charges, such as a "trustee fee" of $675.00 and a "trustee fee/file set up" charge of $300.00, even though the only work that had been performed to date was issuance of the NOD by an agent of Defendant Citi – not the trustee on the Deed of Trust. The charge of $100.00 for posting the NOD was also inflated and at least twice what was usual and customary for performing that work. CP 6-7.

The NOD does not mention the supposedly outstanding charges identified on the statement the Rouses received from Citi in May 2010 for such things as late fees and servicing fees. The NOD references and apparently relies upon the Foreclosure Loss Mitigation Form dated August 18, 2010 which was attached to the NOD. CP 115-16. This form was purportedly signed by one Stephanie Young, apparently an employee of Citi. However, the form does not indicate if any efforts were undertaken to communicate with the Rouses as required by law; as a result, the NOD was issued without lawful authority. RCW 61.24.031(2). The Rouses maintain that Citi did not attempt to work with them at all to prevent the foreclosure. CP 7-8.

Apparently in reliance on the above-referenced MERS Assignment, on or about September 23, 2010, *three weeks after the NOD was issued*, a supposed Vice President of Citi signed an Appointment of Successor Trustee ("AST") purporting to appoint Cal-Western as the foreclosing trustee. CP 118-19. The Rouses maintain that the signer, one

Aaron Menne, was not a Vice President of Citi when he signed this document, and rather, that he only uses that title when he is signing documents in order to create the appearance of greater authority and position than he actually possesses. The AST misidentifies the original Lender as "California Pacific Mortgage Company" (the Rouses' Lender was Central Pacific Mortgage Company). The September 23, 2010 AST claims to be "retroactive" to September 1, 2010. The Rouses maintain that Mr. Menne's signature, even if effective, cannot be retroactive, but they maintain that it is not effective, since Citi was not the beneficiary, as defined under the Deed of Trust Act. RCW 61.24.005(2). This document was recorded in the records of Pierce County, Washington on October 6, 2010. CP 8-9.

On October 21, 2010, a Deborah Schwartz, identified as an "A.V.P." of Cal-Western, signed a Notice of Trustee's Sale ("NOTS") in San Diego, California as the purported trustee. CP 121-25. This document initiated a foreclosure sale of the Rouses' Property even though Cal-Western does not actually operate an office in Washington as required under the Deed of Trust Act. RCW 61.24.030(6). Cal-Western maintains a sham office location in Vancouver where one person works at a desk in a shared office space; if a homeowner actually tries to get information about a foreclosure at that office, he or she is referred to Cal-Western's San Diego County, California office. Any attempt to appoint Cal-Western as the foreclosing trustee, even if undertaken by the actual Note Holder, would thus be invalid since Cal-Western does not comply with

Washington state law regarding who may be a foreclosing trustee. RCW 61.24.010(1)(a), .030(6).[2] Further, records on file with the Washington Secretary of State showed that at the time it was purportedly acting as trustee here, Cal-Western did not list a single officer who is a resident of Washington as specifically required by the Deed of Trust Act. RCW 61.24.010(1)(a). All of the listed officers were residents of Georgia. CP 131-32. The Washington DTA also requires foreclosing trustees to maintain a telephone number in the State of Washington. RCW 61.24.030(6). Cal-Western uses an 800 number on the NOTS document which is answered in California. The person sitting in the office in Vancouver has no information about any Washington state foreclosures. CP 9-10.

The NOTS is deceptive and misleading in a number of ways. For example, it incorrectly names the original Lender as "California Pacific," not "Central Pacific." It lists a total outstanding delinquency on the Rouses' mortgage of $12,011.89, which is wildly inaccurate in light of the payments made by the Rouses. The dollar amount listed as outstanding on the NOTS also contradicts the amount listed on the NOD mailed to the Rouses just two months earlier. The NOD listed $6,125.58 in arrears on payments – an amount which the Rouses also contend is incorrect, as noted above. By October 21, 2010, when the NOTS was purportedly

[2] *See also Barrus v. ReconTrust Co.*, No. 11-1578-KAO, Dkt. No. 114, *13-15 (Bkrtcy. W.D. Wash., May 6, 2013) (Order on Cross Motions for Summary Judgment) (concluding that foreclosure trustee that failed to maintain physical presence in Washington "had no authority under Washington law to pursue the foreclosure proceeding").

signed, the Rouses had only missed, at the most, five payments of $1,012.14 each. But Citi had not properly credited the payments that they had made, and had added on improper fees. The NOTS was recorded in the records of Pierce County, Washington on November 3, 2010. CP 10-11.

Before initiating a non-judicial foreclosure sale, a foreclosing trustee is required to obtain a Beneficiary Declaration showing that the person or entity instructing the trustee to initiate the foreclosure attests under penalty of perjury that it is the "note holder" and therefore a "beneficiary" as defined under Washington law. RCW 61.24.030(7)(a). The Rouses have never seen this document and contend that it does not exist. CP 10.

The Rouses tried to get help in dealing with the pending foreclosure from a HUD-certified housing counselor, but Citi disregarded their repeated efforts. The Rouses provided every piece of information requested of them to the housing counselor and to Citi. Eventually, someone at Citi told the Rouses that the foreclosure sale would be stopped but it was not. The Rouses did all that they knew how to do in order to stop the foreclosure by contacting Citi themselves and through the housing counselor, but their efforts were fruitless. CP 11.

The Rouses' home was called for auction on February 18, 2011 by Cal-Western. The bid Cal-Western accepted for the Property that day was $125,643.18, and the successful bidder was Citi. The Trustee's Deed relating to this auction, dated February 21, 2011, but apparently not

notarized until March 1, 2011, was recorded on March 9, 2011.[3] CP 127-29. One Yvonne J. Wheeler, "A.V.P." of Cal-Western signed the document. Further, the Trustee's Deed was executed in San Diego County, California. CP 11.

The Rouses have been trying since 2012 to get someone at Citi to correct the situation and to rescind the foreclosure sale. Citi had advised the Rouses that its employees would rescind the sale, but rescission never occurred. Citi has not complied with FHA required foreclosure prevention programs in dealing with the Rouses, presumably because Citi will look to the FHA program to reimburse it for any losses on the sale of the home. Citi, or whoever is actually the Note Holder, has every incentive to foreclose on the Rouses' home and increase the alleged amounts owed in order to collect the excess amounts from FHA following the sale of the home. Citi had every incentive to force a foreclosure rather than helping the Rouses prevent one, as they are required to do under the FHA Guidelines. CP 11-12.

In January and February 2012, the Rouses received paperwork indicating that they needed to leave the Property or an eviction proceeding would be started against them. These notices and the subsequent Summons and Complaint were prepared by attorneys from Pite Duncan, LLP, the law firm which is owned by the same large corporate entity and

[3] There also remains a question about how the document can be dated February 21, 2011, but be notarized on March 1, 2011. *See Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 792-93, 295 P.3d 1179 (2013) ("A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place.").

network as Cal-Western: Prommis Solutions. (The Prommis entities are also presently in a bankruptcy.) The Plaintiff on the eviction complaint was listed as "CitiMortgage or its successors and assigns." If Citi is actually the entity that took title to the Rouses' Property and had the legal authority and standing to evict them from the Property, then there would not have been any need to identify as a plaintiff "its successors and assign". The Rouses maintain that Citi was never the Note Holder, and that it has acted for the benefit of another entity at all times throughout the Rouses' foreclosure and that this is merely further evidence of its true relationship to the Rouses' loan. CP 12-13.

The Rouses have suffered significant emotional distress as a result of the actions of Citi and Cal-Western herein. They have suffered sleeplessness, anxiety, headaches and other problems associated with the stress caused by the loss of their home. The Rouses maintain that the foreclosure sale purportedly completed on March 9, 2011 – when the Trustee's Deed was recorded in the records of Pierce County, Washington – is void. CP 13.

Real property records in Pierce County involving Citi and FHA insured loans suggest that Citi is regularly transferring title to HUD of properties that it has obtained through non-judicial foreclosure sales conducted in Citi's name. Thus, it appears that Citi is regularly engaging in the practice of bringing non-judicial foreclosure proceedings by asserting that it is the "beneficiary," when in fact HUD or another government agency is actually the owner of the loan. Citi is transferring

title to the properties after the foreclosure sale in order to place the ownership interest in the name of the proper party after it has deceived and misled everyone else, including the former homeowners, about its role in the foreclosure process. CP 13-14.

The Rouses filed their Complaint in this action on March 1, 2013. CP 1. Defendants Citi and MERS filed a motion to dismiss under CR 12(b)(6) on April 4, 2013, CP 20, arguing, among other things, that the Rouses' claims were barred by the DTA's statute of limitations codified at RCW 61.24.127. CP 20-21, 23-26. Defendant Cal-Western joined in the motion to dismiss, and its argument regarding the statute of limitations, on May 2, 2013. CP 57-60. The Rouses filed a response opposition on May 8, 2013, in which they argued that, as a matter of law, their claims relating to a void trustee's sale are not governed by the statute of limitations under the Deed of Trust Act, and that even if that statute of limitations did apply, the "sale date" mentioned in RCW 61.24.127 is the date when a trustee's sale is completed—in this case, March 9, 2013, if ever. CP 67, 80-86. The trial court granted the defendants' motion to dismiss on May 24, 2013. CP 178. The Rouses filed and served their notice of appeal to this Court on June 4, 2013. CP 179.

B. STANDARD ON REVIEW

A trial court's dismissal of claims under CR 12(b)(6) is reviewed de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal is affirmed only if the appellate court concludes beyond a reasonable doubt that the plaintiff cannot prove "any set of facts which

would justify recovery." *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988). The appellate court presumes all facts alleged in the plaintiff's well pleaded complaint are true, and may consider hypothetical facts supporting the plaintiff's claims. *Id.* A motion to dismiss is granted "'sparingly and with care'" and, as a practical matter, "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Id.* at 420, 755 P.2d 781 (internal quotation marks omitted) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984), and 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 604 (1969)).

C. ARGUMENT

1. BECAUSE THE ROUSES' FORECLOSURE WAS CONDUCTED IN CONTRAVENTION OF THE DEED OF TRUST ACT, THE ACT'S LIMITATIONS ON REMEDIES DO NOT APPLY.

In light of the awesome power the Deed of Trust Act ["DTA"] confers to deprive individuals of property without judicial supervision, the DTA, Chapter 61.24 RCW, provides "strict" limitations on the powers of entities conducting nonjudicial foreclosures in Washington. *See Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013) (the DTA "*is not a rights-or-privileges-creating statute*" but rather presents non-waiveable requirements for foreclosing entities; "strict compliance [with the DTA] is required"); *Albice v. Premier Mortg. Svcs.*

of Wash., Inc., 174 Wn.2d 560, 568, 276 P.3d 1277 (2012) ("As we have already mentioned and held, under [the DTA], strict compliance is required.") (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)). The Supreme Court "has frequently emphasized that the [DTA] 'must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.'" *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013) (citations omitted). (Emphasis added).

Where parties purporting to conduct a nonjudicial foreclosure sale of residential real property fail to conform to the requirements of the DTA, their actions are without legal effect and the sale is invalid. *See Albice*, 174 Wn.2d at 568 ("*Without statutory authority, any action taken is invalid.*"); *Rucker v. Novastar Mortg., Inc.*, ___ Wn.App. ___, ___ P.3d ___, *15-16 (Ct. App. Div. I No. 67770-5-I) (published by order of October 2, 2013) ("the vacation of a foreclosure sale *is required* where a trustee has conducted the sale without statutory authority"); *id.* ("[i]f the failure of a properly-appointed trustee to follow statutory procedures can result in the vacation of a sale, *this remedy is equally appropriate where an entity conducts a trustee sale in the complete absence of authority*"). (Emphasis added).

Here, the requisites to a trustee's sale were never met, so the attempted trustee's sale of the Rouses' home is invalid. *See Schroeder*, 177 Wn.2d at 106-07 (claims arising from violation of requisites to a

trustee's sale set forth at RCW 61.24.030 not barred by waiver; requisites set forth in statutory list "*are not, properly speaking, rights held by the debtor*; instead, they are limits on the trustee's power to foreclose without judicial supervision") (emphasis added). As the reasoning of *Schroeder* requires, the Rouses' claims arising out of the invalid "sale" of their home are not barred by the DTA; rather, Washington cases interpreting the DTA make clear that the Rouses are entitled to relief for the unlawful "sale" of their home.

In the present case, the Rouses' Complaint pleaded claims establishing an invalid nonjudicial foreclosure sale. CP 1-19. For example, the Rouses pleaded that the purported trustee that ultimately managed an auction of their home, Cal-Western, did not maintain a physical presence in the State of Washington; did not maintain telephone service at its purported office in Vancouver, Washington; and did not have among its officers a single Washington resident. Such allegations make clear that Cal-Western did not and could not qualify as a nonjudicial foreclosure trustee under Washington's DTA, because a trustee is required to satisfy *all* those basic requirements. Moreover, *the requisites to a trustee's sale under the DTA were not and could not have been met here*, because Cal-Western, which could not qualify as a statutory trustee due to its lack of Washington officers, also did not even maintain a physical presence in Washington as required by law. RCW 61.24.010(1)(a) ("The trustee of a deed of trust under this chapter *shall be*: (a) Any domestic corporation or domestic limited liability corporation ... *of which at least one officer is a*

Washington resident..."); RCW 61.24.030(6) ("*It shall be requisite to a trustee's sale* ... (6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, *the trustee must maintain a street address in this state where personal service of process may be made*, and the trustee *must maintain a physical presence* and *have telephone service* at such address...") (emphasis added)"); *Walker v. Quality Loan Serv. Corp.,* No. 65975-8-I, *slip op.* at 7 (Wash. App. Div. I, Aug. 5, 2013) ([W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale."); "Such actions by the improperly appointed trustee, we have explained, constitute 'material violations of the DTA.'" *Rucker v. NovaStar Mortgage, Inc.,* ___ Wn.App. ___, ___ P.3d ___, *13 (Ct. App. Div. I No. 67770-5-I) (published by order of October 2, 2013) (citing to *Walker*); *Barrus v. ReconTrust Co.*, No. 11-1578-KAO, Dkt. No. 114, *13-15 (Bkrtcy. W.D. Wash., May 6, 2013) (Order on Cross Motions for Summary Judgment) (foreclosure trustee that failed to maintain physical presence in Washington "had no authority under Washington law to pursue the foreclosure proceeding").

In addition to failing to qualify as a nonjudicial foreclosure trustee as a general matter under Washington law, Cal-Western was not even purportedly appointed as a foreclosure trustee in the Rouses' foreclosure until *after* Cal-Western had already executed and served a Notice of Default on the Rouses on September 2, 2010. Thus, Cal-Western issued a "Notice of Default"—a document whose proper issuance is a requisite for

a subsequent trustee's sale—without having at least one Washington officer, without maintaining a physical presence in Washington, and without ever even purportedly being appointed as the successor trustee. As a result, another of the essential requisites to a trustee's sale was never satisfied prior to Cal-Western's attempt to sell the Rouses' home. *See* RCW 61.24.030(8) ("*It shall be requisite to a trustee's sale* ... (8) That at least thirty days before notice of sale shall be recorded, transmitted or served, *written notice of default shall be transmitted by the beneficiary or trustee* to the borrower and grantor at their last known addresses...") (emphasis added).

Respondents Citi and Cal-Western may argue that Cal-Western's execution and service of the "Notice of Default" here was lawful under the DTA because Cal-Western issued the notice not in its capacity as purported foreclosure trustee, but in a separate capacity as agent for the beneficiary of the Rouses' Deed of Trust. Although Washington's DTA and the cases interpreting it approve of the use of "authorized agents" in specified circumstances, the sections of the DTA permitting authorized agents to take actions on behalf of the beneficiary are few in number and do not include the power to issue Notices of Default.[4] Respondents Citi

[4] Authorized agents may make initial contact with the borrower to provide required information, RCW 61.24.031(1)(a), (b); declare a trustee's sale void, RCW 61.24.050(2); notify a tenant of an impending foreclosure of rental property, RCW 61.24.143; and attend a mediation session under certain circumstances, RCW 61.24.163(8)(a). But the remainder of the DTA *does not* empower agents to act in the beneficiary's stead. *See In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) ("Where the legislature uses certain statutory language in one instance, and different language in another, there is different legislative intent."). *See also Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d at 106-07 (acknowledging DTA provisions regarding authorized agents with the caveat, "[w]e

and Cal-Western cannot bootstrap those specific provisions of the DTA allowing authorized agents to take certain actions into a generalized conclusion that the DTA, and *Bain*, freely allows beneficiaries to delegate their responsibilities to "agents." Furthermore, the provision under RCW 61.24.031(1)(a) providing that "[a] trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030(8) until" specified requirements are satisfied does not confer upon agents the power to issue Notices of Default. RCW 61.24.030(8) makes clear that only a beneficiary or trustee may issue such notices; Section 131 of the DTA was first adopted in 2009, and is consistent with the protective intent of the DTA in that it specifies limited circumstances in which authorized agents may take ministerial actions in the foreclosure process related to managing communications with the borrower on behalf of the trustee and/or beneficiary in attempts to prevent foreclosure. Although the legislature could have amended Section 030(8) to allow authorized agents to issue Notices of Default in 2009, it instead granted *limited* powers to such agents under Section 031, related solely to efforts at avoiding foreclosure. Accordingly, no Notice of Default was properly issued here, and so the requisites of the trustee's sale were never satisfied.

Critically, the purported Appointment of Successor Trustee document executed and recorded here in an attempt to imbue Cal-Western with the power to act as trustee was not only untimely, it was *not executed*

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have repeatedly held that a prerequisite of an agency is *control* of the agent by the principal") (quotation marks and citation omitted) (emphasis in original).

by the beneficiary as required by the DTA because, as the Rouses pleaded, Citi was not the holder of their Promissory Note, and did not own their Note throughout the foreclosure proceedings here. CP 2, 12. Instead, as the Rouses pleaded in their Complaint, it was executed by Citi after and in reliance upon MERS' execution and recording of its own legally unsound Assignment of Deed of Trust document. Even if Cal-Western *could* have qualified as a trustee—which it could not in any event—it was not even purportedly appointed until after the NOD was executed and served, *and* the document Citi executed could not have appointed *any* entity as a successor trustee, because Citi *was not a beneficiary* under the DTA. RCW 61.24.010(2) ("The trustee may ... be replaced *by the beneficiary*"), .005(2) ("'Beneficiary' means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation."); *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012) ("A plain reading of the statute leads us to conclude that *only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee* to proceed with a nonjudicial foreclosure on real property.") (emphasis added). Rather, Citi's only claim to any interest in the Rouses' Deed of Trust arose from the Assignment of Deed of Trust executed by MERS, which conveyed no interest to Citi because MERS had no interest to convey in the Deed of Trust to begin with.

Furthermore, the parties purporting to conduct the foreclosure here attached a faulty Foreclosure Loss Mitigation Form to the Notice of Default, which did not indicate whether the purported trustee had even discharged its statutory duties to contact the Rouses. Accordingly, the requisite to a trustee's sale of issuing a proper Notice of Default *could not* have been lawfully satisfied. RCW 61.24.031(2), (9).

The defects in the foreclosure process here were significant, not only because they demonstrate unfair and deceptive conduct on the part of Cal-Western and Citi, but because ***the requisites to a trustee's sale were never satisfied***. *See Rucker*, ___ Wn.App. ___, *15-16 (Ct. App. Div. I No. 67770-5-I) (published by order of October 2, 2013) ("the vacation of a foreclosure sale *is required* where a trustee has conducted the sale without statutory authority") (emphasis added). Nonetheless, Cal-Western proceeded to call an auction for the Rouses' home in February of 2011. What ensued was not a "sale" as contemplated by the DTA. Rather, it was a purported sale undertaken without lawful authority. Cal-Western's attempt to sell the Rouses' home was invalid, and the "sale" that purportedly took place following the February 2011 auction was, and is, void as a matter of law. The Rouses have pleaded claims arising from that invalid sale which are not subject to dismissal here. *Albice*, 174 Wn.2d at 568 ("*Without statutory authority, any action taken is invalid.*") (emphasis added).

In light of Citi and Cal-Western's pervasive violations of the DTA, the strict, invariable requirements of the DTA, *Schroeder*, 177 Wn.2d at

106, demand that the Rouses be able to proceed with their claims here. The DTA's "strict" requirements rendering sales *invalid* if conducted in contravention of the statute would be quite meaningless if foreclosure "sales" which were invalid from the beginning under *Albice*, *Schroeder*, and *Rucker* could be rendered retroactively effective, solely due to a consumer's failure to bring a claim for rescission within the time period applicable to claims arising from a DTA nonjudicial foreclosure that was otherwise done in conformity with the statutory requirements. Because the Rouses' claims arise not from violations committed in the course of a **valid** DTA nonjudicial foreclosure, but rather, from an unlawful foreclosure that took place wholly *outside* the DTA's statutory foreclosure framework, the statute of limitations within the Deed of Trust Act does not apply to the Rouses' claims. At the very least, it was error to dismiss the Rouses' claim for rescission of the sale because only "a claim for damages" is subject to the two-year statute of limitations under that provision. RCW 61.24.127(1).

The statute of limitations contained within RCW 61.24.127 is inapplicable here because that section only applies to causes of action related to failures to substantially comply with the DTA where the trustee's sale, if any, *is valid*. It would be nonsensical for the legislature's language barring certain borrowers from challenging "the validity or finality of the foreclosure sale," RCW 61.24.127(2)(c), to apply to a borrower whose "foreclosure sale" was *invalid* from the beginning. *See Albice*, 174 Wn.2d at 568 ("*Without statutory authority, any action taken*

is invalid."); *Rucker v. Novastar Mortg., Inc.*, ___ Wn.App. ___, ___ P.3d ___, *15-16 (Ct. App. Div. I No. 67770-5-I) (published by order of October 2, 2013) ("the vacation of a foreclosure sale *is required* where a trustee has conducted the sale without statutory authority"). The legislature did not adopt its statute of limitations and other conditions on stating claims for damages in order to limit plaintiffs whose properties were invalidly sold at an unlawful trustee's sales. And certainly, there is nothing in the legislative history which indicates that the Legislature intended for commercial property owners to have more rights than residential property owners. (RCW 61.24.127 only applies to owner-occupied real property.) Therefore, the Rouses respectfully request the Court to reverse and remand the decision below.

2. EVEN IF RCW 61.24.127'S STATUTE OF LIMITATIONS APPLIES TO THE ROUSES' CLAIMS, THE STATUTE BEGINS TO RUN WHEN A TRUSTEE'S SALE IS COMPLETED, AND SO THE ROUSES' COMPLAINT IS TIMELY.

Although the Rouses argued above that a sale in contravention of the DTA is invalid irrespective of the statute of limitations under RCW 61.24.127, the trial court declined to address the Rouses' argument in its ruling. Rather, the trial court implicitly rejected the Rouses' argument by choosing to dismiss the Complaint as untimely under the DTA's statute of limitations. *See* COL 27 ("[T]he case was not brought within the two-year statute of limitations. And *on that basis alone I'm dismissing.* As I said

before, were this just the issue of claims and whether or not there's been sufficient pleading, I would say there has been sufficient pleading.") (emphasis added). Even supposing that the trial court did not err—as the Rouses maintain it did, **Section C(1)** *supra*—in concluding that the DTA's statute of limitations *applied* to their claims, the trial court erred in concluding that the sale date commencing the statute of limitations began to run on February 18, 2011 in this case. The trial court's conclusion was error, ***first***, because no "sale" ever took place in this case as that term is used within the DTA, and ***second***, because the date when the sale, if any, was completed, was March 9, 2011; accordingly, the statute would begin to run on that date, if ever.

The DTA includes a provision codified at Section 127 of Chapter 61.24 RCW, entitled "Failure to bring civil action to enjoin foreclosure – Not a waiver of claims." The legislative intent behind Section 127 is to reverse the opinion in *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 189 P.3d 233 (Div. I. 2008), which held that the failure to bring DTA related claims prior to a nonjudicial foreclosure sale waives those claims.[5] Subsection 1 of Section 127 states, in its entirety:

> (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter *may not be deemed a waiver of a claim for damages* asserting:

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[5] *See Walker v. Quality Loan Service Corp. of Wash., Inc.*, Case No. 65975-8-I, 2013 WL 3989666, *3 (Wash. Ct. App., August 5, 2013) ("in response to a decision of this court [*i.e. Brown*], in 2009 the legislature explicitly recognized a cause of action for damages for failure to comply with the DTA") (citing Final Bill Report on E.S.B. 5810, at 3, 61st Leg., Reg. Sess. (Wash. 2009); Judiciary Comm., H.B. Analysis on E.S.B. 5810, at 2–3, 61st Leg., Reg. Sess. (Wash. 2009)).

> (a) Common law fraud or misrepresentation;
> (b) A violation of Title 19 RCW;
> (c) Failure of the trustee to materially comply with the provisions of this chapter; or
> (d) A violation of RCW 61.24.026.

RCW 61.24.127(1). The following Subsection 2 provides in relevant part:

> (2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations: (a) The claim *must be asserted or brought within two years from the date of the foreclosure sale* or within the applicable statute of limitations for such claim, whichever expires earlier....

RCW 61.24.127(2) (emphasis added).

While the DTA specifically recognizes claims for money damages and offers limitations thereon, more than one appellate court has recently concluded that "the specific remedies provided in the DTA are not exclusive." *Walker*, ___ Wn.App. ___, Case No. 65975-8-I, *4 (Div. I 2013) (citing *Klem*, 176 Wn.2d 771 (2013)).

Although the DTA does not include a specific definition of the term "sale" as it appears in Section 127, the only provision in the DTA Definitions section defining *any* sale suggests that a sale only takes place within the meaning of the DTA when the DTA's provisions are lawfully observed. That subsection provides specifically that a "'[t]rustee's sale' means a nonjudicial sale under a deed of trust *undertaken pursuant to this chapter*." RCW 61.24.005(17) (emphasis added).

Because a "sale" under the DTA does not include an unlawful attempt to deprive consumers of title to their home in contravention of the

DTA's requirements, no "sale" of the Rouses' home took place here for purposes of the statute of limitations codified at Section 127(2)(a). While this conclusion should be plain from the statutory language defining a trustee's "sale," any doubt in interpreting the DTA must be resolved in light of the legislature's clear intent of protecting vulnerable consumers through the DTA. See *Klem*, 176 Wn.2d at 789 ("The Supreme Court "has frequently emphasized that the [DTA] '*must be construed in favor of borrowers* because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.'") (emphasis added). As explained above, the Rouses have pleaded that the actions of Citi and Cal-Western here were *invalid*, and therefore, despite the appearance of a sale, no sale as contemplated by the Act in fact occurred—the "sale," being void under the DTA, was a nullity.

The conclusion that the statute of limitations under Section 127 does not bar claims stemming from a purported "sale" which is, in fact, an invalid transaction comports with the holdings in *Albice*, *Schroeder*, *Walker*, and *Rucker*. In terms, the statute only provides for limitations on actions where a "sale" occurs—yet how can the statute begin to run where under *Albice*, *Schroeder*, and *Rucker*, the "sale" *was invalid*? If the statute of limitations under Section 127 could bar claims to invalidate void sales, then unlawful "sales" that are, from the beginning, legal nullities would become legally binding, and not subject to challenge, solely as a result of

consumers' not bringing claims within two years of the foreclosure auction.

The legislature plainly had no intention when it adopted Section 127 of incentivizing foreclosing entities to try their luck at conducting unlawful "sales" in the hopes that those invalid transactions could be rendered legally binding when, two years after any given auction, the consumer would be precluded from challenging it. *See* ESB 5810 House Judiciary Committee Report, 5 (61st Leg., Reg. Sess., Wash. 2009) (Staff Summary of Public Testimony) ("This is a consumer protection bill that will help homeowners who are trying to avoid foreclosure. It will require lenders to try to work out plans with borrowers to avoid foreclosure."). Such a result is contrary to the purpose of the overall DTA, but flows directly from the trial court's interpretation of the statute. Moreover, the legislature intended to protect consumers when it adopted Section 127 in particular, by reversing the result in *Brown* to explicitly provide claims for damages where the DTA's foreclosure process is abused, yet a valid sale results.[6] *Id.*, 2-3. The legislature has chosen, by providing limitations on

[6] The plaintiffs in *Brown* did not bring claims related to the validity of the foreclosure sale. Rather, the *Brown* plaintiffs brought claims relating to loan origination and argued "that a postsale claim for damages [regarding the loan origination] does not interfere with the three goals of the Act because it does not directly affect the title obtained by a bona fide purchaser." 189 P.3d at 237. *Brown* held that even such claims for damages could not be asserted if presale remedies had not been pursued, a position that the Legislature swiftly made clear was an incorrect interpretation of the DTA language. It does not follow from *Brown*'s abrogation by DTA Section 127 that plaintiffs seeking to challenge unlawful, *invalid* sales of residential real property are barred from doing so. The Rouses only seek to challenge a "sale" that was invalid from the beginning—an issue never addressed in *Brown* and which has been decided by the Washington Supreme Court in *Albice* and *Schroeder*.

damages actions in Section 127, to strike a balance between protecting the rights of consumers with foreclosure-related claims whose homes are ultimately validly sold under the DTA, and the need to ensure stability of land titles, a recognized goal of the Act. *Walker*, ___ Wn. App. ___, No. 65975–8–I, *3 (citations omitted).

Finally, even assuming that a "sale" did take place in the present case as that term is used in RCW 61.24.127(2)(a), the two-year statute of limitations provided by that subsection did not begin to run in this case until March 9, 2011, the date when the purported sale was *completed*. The Court should conclude that any "sale" for purposes of determining whether consumer plaintiffs' claims are barred by Section 127's statute of limitations cannot take place until the sale is completed by the proper recording of the trustee's deed as required by statute. While such a construction of the statute flows from the plain language chosen by the legislature, any doubt as to the timing of the "sale" should be resolved in favor of vulnerable borrowers. *See Klem*, 176 Wn.2d at 789.

Section 050 of the DTA (titled "Interest conveyed by trustee's deed — *Sale is final **if** acceptance is properly recorded* — Redemption precluded after sale — Rescission of trustee's sale") provides in pertinent part:

> if the trustee accepts a bid, then *the trustee's sale is final as of the date and time of such acceptance **if** the trustee's deed is recorded within fifteen days thereafter.*

RCW 61.24.050(1). The legislature has chosen to adopt the requirement of recording within its specific fifteen-day time window ***if*** a trustee's sale

date is to relate back to the date of the auction; the foreclosing parties' failure to conform with statutory requirements should not be rewarded here with a finding that the failure to record makes no difference. *See Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (courts "are required, when possible, to give effect to every word, clause and sentence of a statute"); *accord, American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008)).

The Rouses properly alleged in their Complaint, on review following the trial court's dismissal on a CR 12(b)(6) motion, that the Trustee's Deed here was recorded nineteen (19) days after the purported sale of February 18, 2011. Accordingly, the sale was plainly not "final" on February 18, 2011 under Section 050. RCW 61.24.050(1).

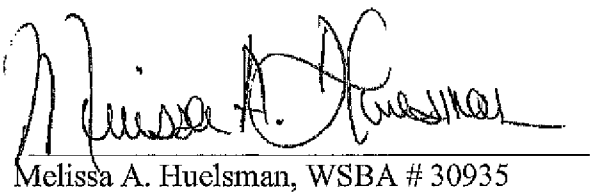
Because the foreclosing entities here failed to record the Trustee's Deed within fifteen (15) days of the auction date, any "sale" the Court finds to have taken place for purposes of the statute of limitations set forth at Section 127 of the DTA cannot "relate back" to the auction date of February 18, 2011. Instead, the "sale" date here, if any, was March 9, 2011 and as such, the Rouses' claims for damages are not precluded by the statute of limitations.

D. CONCLUSION

For the reasons set forth above, Billie and Sandra Rouse respectfully request that the Court of Appeals reverse and remand the decision below because the trial court erred in concluding that RCW

61.24.127(2)(a)'s statute of limitations applies to claims arising out of a purported nonjudicial foreclosure sale of real property which is invalid as a matter of law. Alternatively, the Rouses respectfully request the Court to reverse and remand because the DTA statute of limitations, if applicable here, began to run on the date when the sale was completed: March 9, 2011.

Respectfully submitted this 4th day of October, 2013.



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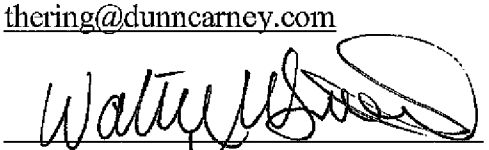

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